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VELLASAMY PONNUSAMY & ORS v. GURBACHAN SINGH BAGAWAN & ORS

HIGH COURT MALAYA, IPOH
ANSELM CHARLES FERNANDIS JC
[CIVIL SUIT NO: 22-114-1994]
B 31 JANUARY 2019

CIVIL PROCEDURE: *Extension of time – Application for – Application for extension of time for assessment of damages – Federal Court and Court of Appeal ordered assessment of damages three and eight years, respectively, prior to application* C *for extension of time – Whether application made within time prescribed under statutory provisions – Whether applicant in breach of O. 37 r. 1 of Rules of Court 2012 – Whether O. 37 r. 1(1) mandatory and applicable to application – Whether there was inordinate delay – Whether there were cogent reasons for delay – Whether there was prejudice*

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Syarikat Pembinaan Perusahaan Kemajuan Bhd ('SPPK') had paid a deposit for the proposed purchase of an estate land owned by Nam Bee Rubber Estate Sdn Bhd ('NBR'). However, upon inquiry with the land office, SPPK discovered that the land could not be transferred to it. To get around this problem, NBR incorporated the third defendant, Simpang Empat Plantation E Sdn Bhd ('SEP'), with its initial directors common with that of NBR's. The land was successfully transferred to SEP and the directors of SEP were replaced with the directors of SPPK. From 1979 to 1984, SPPK entered into agreements ('SPPK agreements') with different purchasers, including the plaintiffs, to sell plots in the land. Unknown to the purchasers, SEP had F created a charge and debenture over the land in favor of MBF Finance ('fifth defendant') as a security for the loan obtained from it. When SEP defaulted in the repayment of the said loan, the fifth defendant proceeded to auction the land. The purchasers approached the first defendant, an advocate and solicitor, and his law firm ('second defendant'). The first defendant, (i) acting G for the purchaser, successfully bid at the auction in his own name; (ii) requested that the purchasers pay the sum of RM276,450, being their contributions towards the deposit payment for the auction bid; (iii) told the purchasers that he was not their lawyer and invited them to buy their allowed plots as the land was his land; (iv) set up Regal Establishment Sdn Bhd ('the fourth defendant') where he was one of the directors; and (v) transferred the H ownership of the land to the fourth defendant. The plaintiff commenced an action at the High Court against the defendants, for declarations that (i) the first and second defendants were the solicitors acting for the plaintiffs with a fiduciary duty; (ii) the land was purchased by the first defendant in trust for the plaintiffs; and (iii) the transfer of the land to the fourth plaintiff was I invalid, null and void. The High Court dismissed the plaintiffs' claim but the decision was reversed by the Court of Appeal. The Court of Appeal further ordered damages be assessed by the Senior Assistant Registrar ('the COA

order'). The defendants' appeal to the Federal Court was unsuccessful. The Federal Court ordered damages to be assessed by a High Court Judge ('the FC order'). The plaintiffs filed the present application for an extension of time to apply for assessment of damages ('encl. 20'), three years and one month after the FC order and eight years after the COA order. Objecting to encl. 20, the defendants argued that (i) encl. 20 was filed out of time and was in breach of O. 37 r. 1 of the Rules of Court 2012 ('ROC'); and (ii) after the first and fourth plaintiffs passed away, there was no order for substitution of parties, under O. 15 r. 7 of the ROC. The second plaintiff did not have the requisite authority to make the application *via* encl. 20 and affirm encl. 21 on behalf of the first and second plaintiffs. The issues that arose for adjudication were: (i) whether O. 37 r. 1(1) of the ROC was mandatory; (ii) whether O. 37 of the ROC applied in this case; and (iii) whether there was an inordinate delay.

Held (dismissing encl. 20 with costs):

(1) Order 37 r. 1(3) of the ROC states that the party against whom judgment is given, in this case the defendants, could apply for assessment where the party for whom judgment had been given, in this case the plaintiffs, does not do so within the stipulated time. This gives the notion that O. 37 r. 1(1) of the ROC is not mandatory as it gives the discretion to the court to assess damages on the application of the party against whom judgment is given. However, O. 37 r. 1(3) of the ROC did not absolve the plaintiffs from making an application within the requisite time frame. Neither could they take advantage of O. 37 r. 1(3) when O. 37 r. 1 had clearly placed the burden on the plaintiffs to apply for assessment. Order 37 r. 1(3) does not detract the nature of O. 37 r. 1(1). Order 37 r. 1(3) is distinct and independent from O. 37 r. 1(1). (paras 35-37)

(2) The COA order was made before the coming into force of the ROC. At that point of time, there was no one-month deadline to apply for assessment of damages as O. 37 r.1 of the Rules of the High Court 1980 ('RHC') was applicable. When the FC order was made, the ROC had come into force. Despite the mandatory nature of O. 37 r. (1) of the ROC, the right that the plaintiffs had acquired under O. 37 r. 1(1) of the RHC, where there was no period prescribed for the plaintiff to commence the assessment of damages, must be taken into account. As O. 37 r. 1(1) of the RHC did not provide a prescribed period for the plaintiff to commence the assessment of damages, s. 54(2) of the Interpretation Acts 1948 and 1967 ('the Act') would be applicable. In coming to any determination of this matter, the court would have to consider whether there was an inordinate delay. In doing so, the court would take into account the reasons for the delay and whether any prejudice had been caused to the first defendant. (paras 43 & 51-53)

(3) The reasons given by the plaintiff, for the delay, were (i) the plaintiff wanted to wait for the determination of the number of purchasers to be added under the representative action; and (ii) there were two motions filed at the Federal Court and there was also an application, by 119 interveners to intervene ('encl. 1'). The reason for the delay, namely 'menangguhkan', for the plaintiffs to determine the actual number of purchasers, lacked cogency. The number of purchasers was never an issue at any stage of the proceedings right up to the Federal Court. The number of purchasers had been settled at 213. The filing of encl. 1 also could not be a reason for the delay in filing encl. 20. (paras 54, 59 & 60)

(4) The delay in applying for the assessment of damages had caused prejudice, specifically to the first defendant. The reasons for the delay, in applying for enlargement of time, was unjustifiable. This became more apparent where the assessment concerned a large area of land involving many individual purchasers, as in this case. The Federal Court expressly ordered that the value of the plaintiffs' shares and individual plots be taken into account in the assessment of damages. In law, land is always deemed to have a special value as it is limited and, therefore, any damages have to be assessed on the basis that its price will rise. The long delay was detrimental to the first defendant, bearing in mind the many purchasers involved. The first defendant would also be prejudiced in the sense that, where judgment is entered and quantum is to be assessed, interest on the judgment debt is to run from the date the judgment was entered and not from the date the quantum was assessed. (paras 61-63)

(5) The defendants' contention, that the second plaintiff did not have the requisite authority to represent the deceased first and fourth plaintiffs, did not affect the legality of this application. The fact remained that the third plaintiff, together with the second plaintiff, were still parties to the proceedings and the representative action still subsisted. (para 64)

Case(s) referred to:

A2i Co Ltd v. MiTV Corporation Sdn Bhd [2016] 1 LNS 716 HC ***(refd)***
Ali Jeman v. Indranika Jaya Sdn Bhd & Ors [2016] 1 LNS 1795 HC ***(refd)***
Berjasa Information System Sdn Bhd v. Tan Gaik Leong & Anor [2017] 6 CLJ 251 CA ***(refd)***
Chong Shao Fen & Anor v. Mehrzad Nabavieh & Ors [2019] 1 CLJ 99 HC ***(refd)***
Gooi Hock Seng v. Chuah Guat Khim [2001] 1 CLJ 583 SC ***(refd)***
Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals [2015] 1 CLJ 719 FC ***(refd)***
JMB Silverpark Resort v. Silverpark Sdn Bhd & Anor [2015] 1 LNS 890 HC ***(refd)***
Koay Hean Khoon v. Abdul Jamil Abdul Mutalib & Anor [2015] 8 CLJ 410 HC ***(refd)***
Liau Kim Lian v. Bajuria [1971] 1 LNS 63 FC ***(refd)***
Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong [2017] 1 LNS 2256 HC ***(refd)***
Mat Jim Wahab v. Nagasteel Equipment Sdn Bhd & Anor [2018] 7 CLJ 105 HC ***(refd)***
Ng Bak Soon & Ors v. Lee Chin Yen & Anor [2014] 1 LNS 1548 HC ***(refd)***
Nusantara Nilam Sdn Bhd v. Hicks Flat JMB [2018] 1 LNS 817 HC ***(refd)***

Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors [2017] 1 LNS 422 HC ***(refd)***
Prudentials Sdn Bhd lwn. YM Tengku Abdul Halim Ibni Almarhum Sultan Ibrahim [2016] 1 LNS 1230 HC ***(refd)***
Takang Timber Sdn Bhd v. Syarikat Tingan Lumber Sdn Bhd [2001] 7 CLJ 641 HC ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***
Tetuan Sri Ling & Associates v. Lian Meng Wah [2015] 3 CLJ 63 CA ***(refd)***
TWT Hardware Sdn Bhd & Anor v. RHB Bank [2017] 1 LNS 628 HC ***(refd)***
Vathemurthy Arumugam & Anor v. RS Thanenthiran Raman Kutty & Anor [2019] 2 CLJ 132 HC ***(refd)***
Vellasamy Ponnusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors [2006] 1 CLJ 805 HC ***(refd)***
Vellasamy Pennusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors [2012] 2 CLJ 712 CA ***(refd)***

Legislation referred to:
Interpretation Acts 1948 and 1967, ss. 2(1)(e), 54(2)
Rules of Court 2012, O. 1A, O. 2 rr. 1, 2, 3, O. 3 r. 5, O. 15 r. 7, O. 37 r. 1(1), (3), O. 92 r. 4, O. 94 r. 3(2)

For the plaintiffs - DP Vijandran & Adrian Jeyaraj Paul; M/s DP Vijandran & Assocs
For the 1st & 2nd defendants - Rabinder Singh & Pavendeep Singh; M/s Rabin & Assocs
For the 139 of 213 plaintiffs - Nadzratun Naim Hammand Azizi, Sharifah Nur Asmaai
For plaintiffs in encl. 27 - Nurilya Ellyna
Watching brief - M Manoharan; M/s M Manoharan & Co

Reported by Najib Tamby

JUDGMENT

Anselm Charles Fernandis JC:

Introduction

[1] This matter came up before this court for an extension of time to apply for assessment of damages as ordered by the Federal Court on 27 November 2014 in *Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals* (Federal Court in Appeal No. 02(f)-61-09-2013(A)) (encl. 20). The relevant paragraphs of the order states:

> (g) An order that there shall be assessment for damages to be paid by the 1st and 2nd Appellants to the Respondents which is to be held before a High Court Judge preferably stationed in High Court Ipoh, Perak. The order of the majority that the assessment is to be done by a Senior Assistant Registrar, Ipoh Perak is varied.
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> (h) we further order that when doing the assessment the value of the respondents shares or plots in the estate land and the profits flowing from the sale of the estate land (to be adjusted according to acreage representing the respondents shares must be taken into account;

A (i) we further order that in the exercise of our discretion the expenditure incurred by the first appellant is to be deducted from the assessed damages and profits;

For convenience, the parties will be known as they were in the suit.

B **[2]** Enclosure 20 was filed by the plaintiffs on 19 December 2017. The plaintiffs sought reliefs under O. 3 r. 5, O. 37 r. 1, O. 2 r. 1 and O. 92 r. 4 of the Rules of Court 2012 (ROC). The defendants strenuously opposed the application on the following grounds:

(a) Enclosure 20 was filed out of time and is therefore in breach of
C mandatory provision of O. 37 r. 1 Rules of Court 2012;

(b) After the first and fourth plaintiffs passed away, there was no order for substitution of parties under O. 15 r. 7 Rules of Court 2012. The second plaintiff does not have the requisite authority to make the application *vide* encl. 20 and affirm encl. 21 on behalf of the first and fourth plaintiffs.

D **Salient Background Facts**

[3] Nam Bee Rubber Estate Sdn Bhd ('Nam Bee') was the registered owners of a large parcel of land ('the estate land'). Syarikat Pembinaan Perusahaan Kemajuan Bhd ('SPPKB') proposed to buy the estate land and
E paid a deposit. Upon inquiry with the land office, SPPKB found out that the estate land could not be transferred to it. To get around this problem Nam Bee incorporated Simpang Empat Plantation Sdn Bhd ('SEP'), the third defendant, with its initial directors common with Nam Bee's. The estate land was thus transferred to SEP on or about 29 October 1984. The directors of SEP were then replaced with the directors of SPPKB. From 1979 to 1984
F SPPKB entered into agreements ('SPPKB agreements') with different purchasers including the plaintiffs to sell plots in the estate land at a purchase price ranging from RM3,500 to RM5,000 per acre. The purchasers bought a total of about 3000 acres of the estate land and the balance remained with SEP. To raise funds, SEP borrowed from MBF Finance (the fifth defendant).
G A charge and debenture were created by SEP in favour of the fifth defendant.

[4] The purchasers, which included the plaintiffs herein, were not told of this charge. SEP subsequently defaulted in the repayment of the loan and the fifth appellant proceeded to auction the estate land. On being aware of the impending auction, the sub-purchasers approached the first defendant, an
H advocate and solicitor. The second defendant was the first appellant's law firm. The first defendant proceeded to act for the purchasers. Subsequently, the first defendant successfully bid at the auction in his own name. At the request of the first defendant some of the sub-purchasers paid the sum of RM276,450 being their contributions towards the deposit payment for the
I auction bid. The first defendant then invited the sub-purchasers to buy their allotted shares or plots from him. The first defendant told the purchasers that he was not their lawyer and that the estate land was his land and that the sub-purchasers would have to buy back their portions of the estate land from him.

[5] The sub-purchasers were not happy at the position taken by the first defendant. They claimed that the first defendant was acting as their solicitor when he made the bid for the estate land. A

[6] Meanwhile, the first defendant proceeded to set up the fourth defendant with him, his wife and a friend by the name of Manjeet as the directors. The first defendant then transferred the ownership of the estate land to the fourth defendant. The first defendant later transferred his shares in the fourth defendant to two other companies. B

[7] The plaintiffs thus commenced the action against the defendants claiming, *inter alia*, for declarations that: (i) the first and second defendants were at all material times the solicitors acting for the plaintiffs with a fiduciary duty; (ii) the said land was purchased by the first defendant in trust for the plaintiffs; and (iii) the transfer of the said land to the fourth plaintiff be declared invalid, null and void. Of the many sub-purchasers involved in the SPPKB agreements only 217 are listed as the respondents in this case. C D

[8] The High Court found in favour of the defendants (see *Vellasamy Ponnusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors* [2006] 1 CLJ 805) and dismissed the plaintiffs' claim. The Court of Appeal set aside the decision of the High Court on 1 December 2009 and granted the declarations prayed for by the plaintiffs (see *Vellasamy Pennusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors* [2012] 2 CLJ 712). When the Court of Appeal reversed the High Court judgment, the Court of Appeal also ordered that damages be assessed by the Senior Assistant Registrar (the Registrar). E

[9] The Federal Court granted the defendants leave to appeal. The defendants' appeal was subsequently dismissed by the Federal Court. On 27 November 2014 the Federal Court ordered damages to be assessed by a High Court Judge. (See *Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals* [2015] 1 CLJ 719). F

[10] Enclosure 20 was filed on 19 December 2017. This was approximately three years one month after the Federal Court order and eight years after the Court of Appeal order. G

[11] After the Federal Court decision and before the filing of encl. 20 there were two motions filed in the Federal Court. In the first motion filed on 16 April 2015 the plaintiffs applied for the judgment of the Federal Court be varied. The variation consisted of increasing the number of sub-purchasers represented by the plaintiffs. The second motion was filed by the executor of the fourth plaintiff's will on 30 September 2015. It was in respect of the discharge of the plaintiffs' solicitors and replacing him with another solicitor to represent the plaintiffs in the representative action. Both these motions were dismissed by the Federal Court on 27 June 2016. H I

[12] On 17 January 2017 an application by 119 proposed interveners represented by their solicitor Mr. Manoharan was filed in the High Court Ipoh (encl. 1). This application was however withdrawn on 10 November 2017 during case management stage. It was then indicated by counsel for the plaintiffs that he would be filing an application for an extension of time for damages to be assessed. Counsel for the defendants however alerted the court that they would be objecting to any such application.

[13] Based on the facts gathered from the affidavits files and arguments presented, it is not disputed that the plaintiff had failed to comply with the requirement of O. 37 r. 1(1) ROC 2012 which require an application for directions for assessment of damages to be made within one month from the date an order or judgment for such assessment is made. This led to this application for extension of time in encl. 20.

Issues To Be Considered

[14] The issues deliberated upon by the court in this application are:

(a) Whether O. 37 r. 1(1) ROC 2012 is mandatory;

(b) Whether O. 37 ROC 2012 applies in this case; and

(c) Whether there was an inordinate delay.

Order 37 r. 1 Rules of Court 2012 states as follows:

> (1) Where judgment is given for damages to be assessed and no provision is made by the judgment as to how they are to be assessed, the damages shall, subject to the provisions of this Order, be assessed by the Registrar, and the party entitled to the benefit of the judgment shall, within one month from the date of the judgment, apply to the Registrar for directions and the provisions of Order 34 shall, with the necessary modifications, apply.
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> (2) On the hearing of the application for directions, the Registrar may, in addition to making such orders as are necessary and appropriate under Order 34, give directions as to the time by which a notice of appointment for assessment of damages shall be filed and such notice upon being filed shall, notwithstanding anything in Order 62, rule 10, be served not later than seven days thereafter on the party against whom the judgment is given. Notice of appointment for assessment of damages shall be in Form 62A.
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> (3) If the party entitled to the benefit of the judgment fails to comply with paragraph (1), the Court may, on the application of the party against whom the judgment is given, proceed to assess damages or make such other order as it thinks just.
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> (4) The attendance of witnesses and the production of documents before the Registrar in proceedings under this Order may be compelled by subpoena, and the provisions of Order 35 shall, with the necessary adaptations, apply in relation to those proceedings as they apply in relation to proceedings at the trial.

(5) Subject to any direction given by the Registrar pursuant to this rule, the party entitled to the benefit of the judgment shall file a notice of appointment for assessment of damages within six months of the date of judgment.

(6) A party shall not file a notice of appointment for assessment of damages by the Registrar pursuant to this rule unless directions for filing and exchange of affidavit evidence pursuant to Order 34 have been given or complied with, as the case may be.

(7) If that party does not file the notice of appointment for assessment of damages within the prescribed period, any other party may apply for directions.

Is O. 37 r. 1(1) ROC 2012 Mandatory?

[15] Learned counsel for the defendant had submitted that the provisions of O. 37 r. 1 are mandatory in that any breach would entail the dismissal of encl. 20. In support thereof, counsel for the defendants relied mainly in the Court of Appeal case of *Tetuan Sri Ling & Associates v. Lian Meng Wah* [2015] 3 CLJ 63 where the Court of Appeal observed:

[50] LMW failed to comply with the mandatory requirement in O. 37 r. 1(1) of the Rules of Court 2012 when he did not file for directions of the Registrar within the prescribed period of one month from the date of the said judgment in default. Neither did LMW comply with O. 37 r. 1(3) which requires him to file the notice of appointment for assessment for damages within six months from the date of judgment which is also a mandatory requirement.

[51] **In the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329; [2009] 4 MLJ 149 the Federal Court held that where there is a mandatory prerequisite,** that should be complied with and non-compliance rendered the service defective. The court in *Aminah Abas v. Pentadbir Tanah Daerah Kuantan* [2004] 5 CLJ 1; [2003] 4 MLJ 669 and *Low Cheng Soon v. TA Securities Sdn Bhd* [2003] 1 CLJ 309; [2003] 1 MLJ 389 also gave similar interpretation to the word 'shall' which means mandatory and not directory and that the word reflects a measure of mandatoriness in it. (emphasis added)

[16] Counsel put forth the argument that this court was bound by the decision in *Tetuan Sri Ling & Associates* by virtue of the doctrine of *stare decisis*. It was further submitted that the mandatory nature of O. 37 r. 1 was also determined in the case of *JMB Silverpark Resort v. Silverpark Sdn Bhd* [2015] 1 LNS 890; [2015] MLJU 863 where the High Court made the following observation:

[14] I do not think that the Plaintiff's inadvertence or mere oversight is a cogent reason or reasonable excuse for the Plaintiff s failure to comply with the requirements of O. 37 r. 1(1) of the ROC. The statutory requirement file the Summons for Directions within 1 month from the date of the High Court Order on 9.11.2012 is

A mandatory, and not discretionary, as can be seen from the use of the word "shall" in O. 37 r. 1(1) ROC which, *inter alia*, provides that the party entitled to the judgment shall, within one month from the date of the judgment, apply to the Registrar for directions (emphasis added).

B [17] I fully agree with the SAR in her above grounds. By the use of the word "shall" in O. 37 r. 1(1) of the ROC, it is no longer a mere technical noncompliance of the Rules by the Plaintiff when the rule makes it mandatory to file the Application within 1 month from the date of the High Court Order.

C **[17]** Defendant counsel further stressed that the one-month deadline was only added with the coming into force of the ROC 2012 on 1 August 2012. The significance of this addition was explained in the case of *Prudentials Sdn Bhd lwn. YM Tengku Abdul Halim Ibni Almarhum Sultan Ibrahim* [2016] 1 LNS 1230; [2016] MLJU 682 where Ahmad Bachik JC (as he then was) stated:

D [16] Mahkamah bersetuju dengan pihak Defendan bahawa berdasarkan kepada peruntukan Aturan 37 kaedah 1, pihak Plaintif sebagai pihak yang memperolehi Penghakiman tersebut harus mengemukakan permohonan untuk arahan bagi taksiran gantirugi kepada Pendaftar dalam masa 1 bulan daripada tarikh keputusan Mahkamah Rayuan

E diperolehi.

[17] Mahkamah berpendapat bahawa perkataan "shall" yang digunapakai di dalam Aturan 37 Kaedah 1 adalah bersifat mandatori. Dalam erti kata lain adalah mandatori bagi pihak-pihak yang berkepentingan untuk mematuhi kehendak Aturan tersebut yang mana permohonan

F untuk arahan taksiran gantirugi perlu difailkan atau dibuat dalam tempoh masa 1 bulan daripada tarikh Penghakiman.

[19] Tambahan lagi, sebagaimana dinyatakan tadi, A. 37 k. 1 ini hanya diperkenalkan di bawah Kaedah-Kaedah Mahkamah 2012 yang mana tempoh masa sebulan ini tidak ada sebelum ini di bawah Kaedah-Kaedah Mahkamah Tinggi 1980. *Sudah tentunya ada*

G *tujuannya kenapa kaedah tersebut dipinda. Ianya adalah untuk menghadkan tempoh masa untuk pihak yang dibenarkan tuntutan mereka oleh Mahkamah Tinggi/rayuan mereka dibenarkan oleh Mahkamah Rayuan dihadkan kepada dalam tempoh 1 bulan, bukan bila-bila masa, untuk memfailkan permohonan.* (emphasis added)

H **[18]** The consequences of 1 August 2012 amendments were again discussed in *TWT Hardware Sdn Bhd & Anor v. RHB Bank* [2017] 1 LNS 628; [2017] MLJU 598 where the court succinctly stated:

[35] This Court is of the view that when the ROC 2012 came into force on 1 August 2012, Order 37 rule 1 was amended and prescribed that

I the party entitled to the benefit of an order for damages to be assessed must apply to the Registrar within one month of the grant of the order for damages for directions for an assessment of damages to be carried out. It was therefore the intention of the law

namely; the Rules (ROC 2012) that in instances of infringement of rights against any parties, and that the innocent party suffers injuries, the damages suffered must be assessed as soon as possible. Thus, Order 37 rule 1 requires that the party entitled to benefit of the judgment (entitled to their damages being assessed) must file their notice of directions within one month from the judgment so that the assessment proceeding could be carried out immediately. *This Court opines that the one month period stipulated by the ROC must be read to mean that the assessment of damages must be carried out expeditiously and without unnecessary delay. The time limitation was set to one month so that the damages suffered by the parties can be minimized and any other extenuating factors/circumstances which can aggravate the amount of losses suffered which would then be prejudicial to the Defendant can be avoided.*

[36] It has never been the law's intent to punish the Defendant or coerce the Defendant to pay a compensation which was maximised as much as possible for the Defendant's infringement of rights or wrongdoings.

[37] This Court also opines that the delay in having the assessment of damages proceeding being carried out earlier is highly prejudicial to the Defendant.

[38] This Court simply cannot allow such contention by the Plaintiff to become a precedent. There are great and imminent reasons behind the necessity of an expedient assessment of damages. (emphasis added)

See also the case of *Ali Jeman v. Indranika Jaya Sdn Bhd & Ors* [2016] 1 LNS 1795.

[19] Learned counsel for the plaintiffs relied in the case of *Petra Perdana Berhad v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors* [2017] 1 LNS 422 where in holding that the provision of O. 37 r. 1 ROC 2012 was not mandatory. The judgment in *Petra Perdana* is quoted *in extenso* as the underlying principles depended upon by counsel for the plaintiff are found therein and thoroughly explained. There, Her Ladyship Khadijah Idris JC stated that:

[41] Adopting the approach laid down and applying the principles established in the authorities, I conclude O. 37, r. 1(1) RoC 2012 (the full text of the provision in paragraph 13) in so far as the 1 month requirement for filing of application to seek direction for assessment of damages is not intended to be mandatory in nature. My reasons are as follows:

(a) Order 37, r. 1(1) ought to be read in the context of O. 37 as a whole and not in isolation;

(b) Order 37, r. 1(3) provides in the event a party in whose favour the judgment was made fail to seek direction within 1 month from the date of the judgment, the party against whom the judgment is given may apply to the court for the damages to be

assessed. If the 1 month requirement under O. 37, r. 1(1) is intended to be absolutely mandatory, r. 1(3) would not have been formulated by the legislator. As we are reminded time and again, Parliament does not legislate in vain;

(c) although the word use in O. 37, r. 1(3) is "may", such provision is intended as a "back up" provision to O. 37, r. 1(1). The said r. 1(3) intends to put on alert the party against whom the judgment is made of the steps it should take in the event the party who is entitled to the benefit of the judgment fail to seek for direction from the court. No doubt the other party against whom judgment is made would not want to do so for obvious reason and would conveniently and deliberately leave it to the party who is entitled to the benefit of the judgment to pursue the matter. The moment the party who is entitled to the benefit of the judgment commence to seek for directions *albeit* out of time, the other party will attack on technical grounds, just like in the instant appeals;

(d) the Defendants could or should have invoked O. 37, r. 1(3) RoC 2012 to seek for directions from the court when the Plaintiffs fail to do so within the stipulated period in O. 37, r. 1(1) RoC 2012. By choosing not to do so, the Defendants contribute to the delay which they alleged to have been committed by the Plaintiff in seeking directions for damages. The fact that the said O. 37, r. 1(3) provides for the Defendants to apply to court for damages to be assessed in the event Plaintiff fail to act within the 1 month after judgment is clearly a strong indication that O. 37, r. 1(1) was never intended to be mandatory;

(e) such intention is further illustrated in O. 37, r. 1(7) which provides for the filing of a notice of appointment of assessment of damages (in Form 62A) to be made by any other party to the matter in the event the party who is entitled to the benefit of the judgment fail to do so within 6 months from the date of the judgment. This r. 1(7) to my mind is another "back up" provision;

(f) I am aware the words "... shall within one month ..." were subsequently inserted when amendment was made to the said provision. The said insertion obviously impose a fix period within which the direction for assessment of damages is to be sought by the party entitled to the benefit of the judgment.

(g) under O. 37 RHC 1980 there was no requirement to seek directions for assessment of damages from the court. Instead the party in whose favour the judgment is made is required to obtain the necessary appointment date from the court and serve the notice of appointment on the party against whom the judgment is made. The old provision does not fix a time frame as to when the appointment date is to be obtained. Also, there is no requirement for the party against whom the judgment is

made to obtain the appointment date should the party who is entitled to the benefit of the judgment fail to do so. In other words, there is no "back up" provision equivalent to the current O. 37, r. 1(3) and (7) RoC 2012;

(h) whilst it is obvious the insertion of the 1 month requirement in O. 37, r. 1(1) RoC 2012 is to fix a time period, such provision must be read together with r. 1 (3) and (7) of O. 37 RoC 2012 which was also inserted at the same time when the 1 month requirement is inserted in O. 37, r. 1(1) RoC 2012. Interpreting O. 37, r. 1(1) RoC 2012 in isolation and without regard to the other sub-rules in the same O. 37 would create disharmony which would defeat the full effect of the said O. 37; and

(i) it is apparent that O. 37 was formulated with "back up" provisions where both parties are required and expected to take the necessary steps to put a closure to the matter expeditiously. This is especially so in the instant case where judgment was made by the High Court after full trial where testimonial evidence of witnesses were heard. I am of the view such formulation is manifestly clear of the different approach of the ROC 2012 (in particular O. 37 in this instant appeals) which is intended to prevent delay in the progress of a case to trial and for its completion (*Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC). In this regard reference is made to O. 2, r. 1(2) RoC 2012 which states that parties are required to assist the court to achieve the overriding objective of enabling the court to deal with cases justly.

[20] Learned counsel for the plaintiffs also argued that O. 37 r. 1(1) had to be read together with O. 1A, O. 2 rr. 1, 2 and 3 and O. 3 r. 5 ROC 2012 in order to do substantive justice. Learned counsel stressed that in interpreting O. 37 r. 1(1) ROC 2012 the overriding interest of justice was paramount and this court should not be tied down with technicalities. Learned counsel also referred to O. 1A which provides that the court should not be obsessed with technicality and should not allow procedural irregularity to affect the essential justice of the case.

Whether O. 37 r. 1 ROC 2012 Applied

[21] The plaintiffs' contention is that despite the fact that they had applied for an extension of time to apply for assessment of damages, O. 37 r. 1 ROC 2012 does not apply in the present situation. They assert that the Federal Court order was not within the purview of O. 37 r. 1 as it was a directive by the Federal Court to the High Court as to how damages are to be assessed.

[22] In any event, the plaintiffs contend that O. 37 only applies where the High Court orders assessment of damages. The plaintiffs contend that it does not apply in the present situation where the directive from the Federal Court.

[23] The defendants contend otherwise. They argue that O. 37 r. 1(1) ROC 2012 would still be applicable despite the fact that the direction for assessment came from the Federal Court.

[24] To reinforce his argument, defendants' counsel cited the case of *Ng Bak Soon & Ors v. Lee Chin Yen & Anor* [2014] 1 LNS 1548. In this case, the learned judge in the course of his judgment stated the following:

> This application in Enclosure 99 by the Ps is **pursuant to the decision and direction of the Court of Appeal** as follows:
>
> > [12] To conclude, we allow the appeal with costs with a further order that the case be remitted back to the High Court for damages to be assessed by the High Court Judge for breach of contract, and such damages as assessed shall carry interest at the rate of 4% per annum from the date of filing of the Writ of Summons until full satisfaction thereof ...
> >
> > It has fallen on me then to do the delicate exercise of assessing **damages *in lieu* of rescission** which the Ds said is actually an assessment of **damages for breach of a collateral contract** as reflected in the sealed order approved and extracted by both parties with the consequence that the principles and hence the final quantum would be poles apart one from the other. (emphasis added)

[25] Learned counsel for the defendants further argued that as the Federal Court order was directed to the High Court, the procedure in the ROC 2012 as regards to assessment of damages applied. In support for this proposition, counsel referred to the case of *Prudentials Sdn Bhd (supra)* where it was concluded that O. 37 r. 1 was applicable even where the order originated from the Court of Appeal. Ahmad Bache JC (as he then was) stated:

> [20] Mengenai pemakaian Aturan 37 Kaedah 1, KKM (2012) *Mahkamah bersetuju bahawa walaupun keputusan yang dimaksudkan tersebut adalah keputusan Mahkamah Rayuan, Aturan 37 Kaedah 1 tersebut masih lagi terpakai kerana apabila rayuan Plaintif telah dibenarkan ianya telah dikembalikan ke Mahkamah Tinggi bagi taksiran gantirugi dijalankan oleh Timbalan Pendaftar sepertimana diperintahkan oleh Mahkamah Rayuan.* Memandangkan kes telah dikembalikan ke Mahkamah Tinggi maka Aturan 37 tersebut adalah terpakai dan mengikat pihak Plaintif. Kegagalan pihak Plaintif mematuhi tempoh masa sebulan sebagaimana ditetapkan mengakibatkan permohonan untuk taksiran gantirugi kini hanya boleh dibuat dengan suatu kebenaran (leave) diperolehi terlebih dahulu daripada Mahkamah ini. (emphasis added)

The Delay And The Application For Extension Of Time

[26] Briefly, the plaintiffs explained that the reasons for the delay were that the decision of the Federal Court had created "a problem" ("suatu masalah") for the plaintiffs as relief was only granted to 217 persons, namely the four plaintiffs and the other 213 persons they represented. Counsel for the plaintiffs however contended that there were approximately 600 purchasers' details of which had been given at the trial.

[27] According to the plaintiffs, there was a need for the plaintiffs to discuss with the other sub-purchasers. The plaintiffs had instructed their solicitors Messrs DP Vijandran Associates to postpone or "menangguhkan" any further action until these discussions were over. Subsequently and after several months later, the plaintiffs had decided to file the first motion to vary the Federal Court order and to include the other purchasers in the representative action. Learned counsel for the plaintiffs also asserts that the delay was partly caused by the actions of the executor of the estate of the fourth plaintiff in respect of the second motion. As mentioned earlier both these motions were dismissed by the Federal Court on 27 June 2016.

[28] Plaintiffs' counsel adds that contributing to the delay was the application to intervene in encl. 1 for 119 proposed interveners to be recognised as sub-purchasers and that Messrs DP Vijandran Associates be discharged and be replaced with Messes M Manoharan as solicitors for the fourth plaintiff and the 119 proposed interveners. Enclosure 1 was eventually withdrawn on 1 November 2017. Counsel for the plaintiffs argued that he had to wait until encl. 1 was withdrawn before he could apply for the extension of time.

[29] Apart from the reasons discussed above, counsel for plaintiffs also attributed the delay to the fact that Federal Court had on several occasions postponed the application to amend the order made. There was also delay in extracting the sealed order from the Federal Court Registry. The sealed order was only extracted on 29 December 2016.

[30] The plaintiffs further submitted that any prejudice to the first plaintiff can be compensated with cost.

[31] Counsel for the defendants had argued that there was an inordinate delay in the filing of the application in encl. 20. The plaintiffs took around three years and one month from the pronouncement of the judgment to the filing of encl. 20. They further argued that the long delay had seriously prejudiced the first defendant. The determination of the number of purchasers cannot be an excuse for the delay as the number of sub-purchasers had been determined at the High Court, Court of Appeal and Federal Court from the onset.

Findings Of The Court

[32] There seem to be a divergence in views in respect of the mandatory one month deadline in O. 37 r. 1(1) ROC 2012. On the one hand, cases like *Petra Perdana Berhad (supra)*, *Chong Shao Fen & Anor v. Mehrzad Nabavieh & Ors* [2019] 1 CLJ 99 and *Nusantara Nilam Sdn Bhd v. Hicks Flat JMB* [2018] 1 LNS 817 indicate that non-compliance with O. 37 r. 1(1) of the Rules of Court 2012 is not mandatory and subject to justifiable grounds being given, the court has a discretion to extend the one month period. For instance, in *Nusantara Nilam Sdn Bhd* the court held that:

A Although couched in apparently mandatory terms by the use of the word "shall", I am of the opinion that the time period in Order 37 Rule 1(1) is directory in nature. The rule itself does not provide for the extinction of the right to damages conferred under a judgment or a bar to its enforcement.

B **[33]** Conversely, cases where O. 37 r. 1(1) ROC had been declared to be mandatory include *Sri Ling & Associates (supra)*, *JMB Silverpark Resort (supra)*, *TWT Hardware Sdn Bhd (supra) and Ali Jeman v. Indranika Jaya Sdn Bhd (supra).* Along similar vein, see also the recent cases of *Mat Jim Wahab v. Nagasteel Equipment Sdn Bhd & Anor* [2018] 7 CLJ 105 and *Lucy Wong Nyuk King (f) & Anor v. Hwang Mee Hiong (f)* [2017] 1 LNS 2256.

C

[34] In this regard, not only do I agree with the findings of the Court of Appeal in *Sri Ling & Associates (supra)* in respect of the mandatory nature of O. 37 r. 1 ROC 2012, I am also bound by the findings of the Court of Appeal in that case. Significantly, counsel for the defendants also brought to this

D court's attention to the fact that *Sri Ling & Associates (supra)* was not referred to in the case of *Petra Perdana Berhad (supra)* a case which was heavily relied upon by counsel for the plaintiffs.

[35] It is perhaps appropriate at this juncture to deal with O. 37 r. 1(3) ROC. Briefly O. 37 r. 1(3) states that the party against whom judgment is

E given (in this case the defendants) can apply for assessment where the party for whom judgment had been given (in this case the plaintiffs) does not do so within the stipulated time. This gives the notion that O. 37 r. 1(1) is not mandatory as it gives the discretion to the court to assess damages on the application of the party against whom judgment is given.

F **[36]** This court is however, of the opinion that O. 37 r. 1(3) does not absolve the plaintiffs from making an application within the requisite time frame. Neither can they take advantage of O. 37 r. 1(3) when O. 37 r. 1 had clearly placed the burden on the plaintiffs to apply for assessment. Order 37 r. 1(3) thus does not detract from the mandatory nature of O. 37 r. 1(1).

G **[37]** In this respect, O. 37 r. 1(3) is distinct and independent from O. 37 r. 1(1). This point was exemplified in the case of *Mat Jim Wahab (supra)* where Noorin Badaruddin J observed:

H [21] The plaintiff further argued that pursuant to O. 37 r. 1(3) of the Rules of Court ("ROC") the delay in filing the NMA is not fatal to the assessment process as the court may on the application of the party against whom the judgment is given, proceed to assess damages or make such order as it thinks just. The plaintiff contends that the rule provides avenue for the unsuccessful party to proceed with the assessment proceedings in circumstances where a delay in the assessment of

I proceedings may prejudice the unsuccessful party. According to the plaintiff, as the defendants being the unsuccessful party did not on their own accord initiate assessment proceedings, they ought to be estopped from raising the issue of delay against the plaintiff.

> [22] *This court is of the considered view that O. 37 r. 1(3) is independent and not subject to r. 1(1). Order 37 r. 1(3) cannot negate the mandatory obligation of the plaintiff who is entitled to the benefit of the judgment to file the application for the assessment of damages within one month from the date of the judgment.* Unlike O. 37 r. 1(1), the word "may" in O. 37 r. 1(3) does not make it mandatory for the court to assess the damages and on the defendants against whom the judgment is given to make the application. (emphasis added)

[38] Further, the plaintiffs' contention that the defendants could or should have applied for assessment of damages is neither here nor there. What is evident is that as long as no application is made, the interest on the damages which is to be assessed will continue to run from the date of the judgment. See *Liau Kim Lian v. Bajuria* [1971] 1 LNS 63; [1971] 1 MLJ 276, *Gooi Hock Seng v. Chuah Guat Khim* [2001] 1 CLJ 583.

Is O. 37 r. 1 Applicable?

[39] To recapitulate, the judgment of the Court of Appeal was given on 1 December 2009. The judgment included the order for damages to be assessed by the Registrar. In the meantime, the Rules of the High Court 1980 (RHC) [P.U. (A) 50/1980] had been repealed and replaced with ROC 2012 [PU(B) 282/2012] which came into force on 1 August 2012. The Federal Court delivered its judgment on 27 November 2014 and ordered damages to be assessed by the judge preferably in the High Court Ipoh (para. g). In relation to the assessment, the Federal Court also ordered that the value of the plaintiffs' shares and plots and the profits from the sale of the estate land be taken into account in the assessment (para. (h)). It was further ordered that the expenditure incurred by the first appellant be deducted from the assessed damages and profits (para. (i)). The present application in encl. 20 was filed on 19 December 2017.

[40] In considering learned counsel for the plaintiffs' contention that O. 37 r. 1(1) is not applicable, this court is of the view that the inclusion of paras. (g), (h) and (i) in respect of the assessment of damages in the Federal Court order does not amount to "a provision" made as to "how they are to be assessed". See O. 37 r. 1(1).

[41] This court is of the view that the Federal Court was just giving directions as to several of the matters which should be taken into account when assessing damages. There was no mention as to the mode of assessment or any time frame as to when the assessment is to take place. Thus, quite apart from those matters directed by the Federal Court, other matters concerning damages such as remoteness, mitigation and veracity were left to the High Court which was to conduct the assessment. That being the case, the applicable Rules governing assessment of damages in the High Court would apply. See *Prudentials Sdn Bhd (supra)*.

[42] The same reasoning would apply to the assessment being ordered by the Court of Appeal. *The Malaysian Civil Procedure* 2015 Edition at Vol 472 specifically states as follows:

> **Order 37 also applies where an appeal against a judgment of the High Court dismissing an action has been allowed by the Court of Appeal** and the action is remitted to the court for the assessment of damages. (emphasis added)

[43] I however realise that by merely stating that the applicable Rules of the High Court on assessment would apply is not the end of the matter. By going into the factual matrix of things, it can be seen that the order for assessment was made by the Court of Appeal before the coming into force of the ROC 2012. In other words, at that point of time, there was no one month deadline to apply for assessment of damages as O. 37 r. 1(1) RHC 1980 was applicable. At the time when the Federal Court affirmed in part the decision of the Court of Appeal and ordered for the damages to be assessed by a High Court Judge preferably based in Ipoh, the ROC 2012 had already come into force. The present application was only made on 19 December 2017. It incumbent on this court therefore to consider whether the RHC 1980 or ROC 2012 is applicable in the circumstances of this case. For convenience, I reproduce O. 37 r. 1(1) RHC 1980:

> **Rule 1. Assessment of damages by Registrar. (O. 37 r. 1)**
>
> (1) Where judgment is given for damages to be assessed and no provision is made by the judgment as to how they are to be assessed the damages shall, subject to the provisions of this Order, be assessed by the Registrar, and the party entitled to the benefit of the judgment may, after obtaining the necessary appointment from the Registrar and, at least 7 days before the date of the appointment, serving notice of the appointment on the party against whom the judgment is given, proceed accordingly.

[44] In the case of *Koay Hean Khoon v. Abdul Jamil Abdul Mutalib & Anor* [2015] 8 CLJ 410 the plaintiff, pursuant to O. 3 ROC 2012, applied for an extension of time to apply for directions in relation to the hearing of assessment of damages as ordered pursuant to the High Court order dated 19 December 2011 when the RHC 1980 was then in force. The application for extension of time was filed on 18 February 2014 when O. 37 r. 1(1) ROC 2012 had come into being. As to the issue whether the ROC 2012 applied, S Nantha Balan JC (as he then was) held that:

> [71] Since the instant application is predicated under O. 3 of the ROC, it implies that the plaintiff considers himself bound by the ROC. Of course, it is correct that when the ROC came into force, the time period of one month had already expired. **However, plaintiff ought to have filed an application as soon as possible after the coming into force of the ROC.** But the plaintiff took no steps to apply immediately after 1 August 2012. Instead the plaintiff waited until 18 February 2014 to apply for extension of time for assessment of damages to be carried out.
>
> (emphasis added)

[45] Following the case of *Koay Hean Khoon* is that of *A2i Co Ltd v. Mitv Corporation Sdn Bhd* [2016] 1 LNS 716. In this case, judgment was entered against the defendant on 27 October 2010. The court granted an order, among others, damages to the plaintiff on a *quantum meruit* to be taxed by the court. The plaintiff had filed a notice of appointment for assessment of damages on 8 January 2014 (encl. 29). The defendant applied to strike out encl. 29. The ground for the application was the non-compliance with O. 37 r. 1(1) ROC 2012. Pursuant to this, the plaintiff then applied to extend or abridge time in respect of encl. 29. In considering whether the RHC 1980 or ROC 2012 would apply the court held that:

> [10] Even though the Judgment was entered in 2010, the Plaintiff did not file the Notice for Assessment before the ROC 2012 comes into effect. The Plaintiff only filed enclosure (29) in 2014, after ROC 2012 comes into effect. *Therefore, when enclosure (29) was filed in 2014, it must comply with the ROC 2012.* In the case of *Tribunal Tuntutan Pembeli Rumah v. Westcourt Corporation Sdn Bhd & Other Appeals* [2004] 2 CLJ 617, the issue before the Court of Appeal is whether the Housing Tribunal has any jurisdiction to hear house buyers' claim arising from sale and purchase entered into with the developers before 1.12.2002, the appointed date which the Amending Act takes effect. The Court of Appeal held that the date of the sale and purchase agreement is not material, so long as the statutory conditions were satisfied. In the present case, the date of the Judgment is not material, *but when the Plaintiff files enclosure (29) after the ROC 2012 comes into effect, then the Plaintiff will have to comply with the procedures set out in the ROC 2012, not under the RHC 1980.*
>
> *[11] Therefore, I also agree with the Defendant that pending applications or proceedings must comply with the ROC 2012 pursuant to Order 94 rule 3(2) which reads:*
>
> > *(2) All pending actions and applications that were commenced before the date of coming into operation of these Rules shall, from the date of coming into operation of these Rules, proceed in accordance with the provisions of these Rules.*
>
> [12] Therefore, once the Plaintiff filed for assessment for damages in 2014, *the Plaintiff must comply with ROC 2012, specifically Order 37 r. 1(1).* (emphasis added)

[46] Based on *Koay Hean Khoon (supra)* and *A2i Co Ltd (supra)*, it would seem that where the assessment date is after the coming into force of the ROC 2012 the one-month deadline in O. 37 r. 1(1) ROC would apply notwithstanding that the order for assessment was made before 1 August 2012. The rationale for this is provided for in O. 94 r. 3(2) although the case of *Koay Hean Khoon* does not explicitly state so.

[47] In determining this issue, I had also considered the Court of Appeal case of *Berjasa Information System Sdn Bhd v. Tan Gaik Leong & Anor* [2017] 6 CLJ 251. The issue for consideration was whether O. 37 r. 1(1) of the ROC 2012 should be applied retrospectively to the judgment obtained.

[48] The brief facts are the appellant obtained judgment against the respondent on 7 February 2007 with damages to be assessed under the then Rules of the High Court 1980. Directions for assessment of damages were only sought on 20 May 2014. This was done under O. 37 of the Rules of Court 2012. However, under O. 37 r. 1(1), as mentioned, such an application must be made within one month from the judgment. On the other hand, there was no similar time frame imposed in the Rules of the High Court 1980. The respondent objected saying that the application for assessment of damages was out of time. The Deputy Registrar upheld the objection and the application for assessment of damages was dismissed.

[49] On appeal before the learned Judicial Commissioner, it was argued by the appellant that the Rules of the High Court 1980 should apply. However, the learned Judicial Commissioner found favour with the respondent's contention that, being a subsidiary legislation of a purely procedural nature, the Rules of Court 2012 applied retrospectively and the appeal was dismissed. The appellant then appealed to the Court of Appeal.

[50] In delivering the judgment of the Court of Appeal, Tengku Maimun Tuan Mat JCA (as Her Ladyship then was), held as follows:

> [15] Whilst we agreed with the learned JC that the Rules of Court 2012 is a procedural law, we disagreed that simply because the Rules of Court 2012 concern procedural law, it must be applied retrospectively to the judgment dated 7.2.2007.
>
> [16] In this regard, we found that the learned JC failed to consider the full effect of the case of *Sim Seoh Beng (supra)* cited by him.
>
> …
>
> [18] This Court in *Sim Seoh Beng* held that the amendment introduced to O. 29 of the Rules of the High Court 1980 should not be construed as retrospective provisions. For ease of reference, we will reproduce *in extenso* the judgment of Gopal Sri Ram JCA (as he then was) where at pages 296-297, His Lordship said:
>
> The traditional approach to the interpretation of statutes (which includes subsidiary legislation such as the Rules of the High Court 1980) in this area is contained in the general rule that, in the absence of express words or necessary implication, statutes affecting substantive rights are prospective while those affecting procedure are retrospective. *In the case of rules of court, there is a rider to the general proposition. It is this. A rule of court should not be given an interpretation that would result in unfairness or produce a manifest injustice: Bank of America v. Chai Yen* [1981] 1 LNS 60; [1981] 1 MLJ 198 at p 199 ...
>
> …
>
> [25] Coming back to the present appeal, when the plaintiff obtained judgment against the defendants on 7 February 2007, there was no period prescribed for the plaintiff to commence the assessment of damages. Applying the principles laid down by the Privy Council in *Yew Bon Tew*

which were applied by this court in *Sim Seoh Beng (supra)*, and *RHB Bank Bhd (supra)*, the plaintiff had the substantive rights under the judgment and to hold that O. 37 r. 1(1) of the Rules of Court 2012 had a retrospective effect would result in unfairness, as it would impair the plaintiff's existing rights under the said judgment.

[26] As for the contention that the plaintiff must follow O. 37 r. 1(1) of the Rules of Court 2012 because the plaintiff itself has cited Rules of Court 2012 in its application, the answer is found in the passage quoted from *Yew Bon Tew* above, namely that "A statute which is retrospective in relation to one aspect of a case... may at the same time be prospective in relation to another aspect of the same case.

[27] *In our judgment, the plaintiff was correct to make the application under Rules of Court 2012 as the Rules of the High Court 1980 were no longer in existence. In that aspect, the Rules of Court 2012 was to be applied retrospectively, i.e. in relation to the manner in which the plaintiff should proceed with the assessment of damages. However, in relation to preserving the rights of the plaintiff under the judgment, the Rules of Court 2012 should be applied prospectively.* Flowing from the aforesaid, we were of the view that the plaintiff's failure to apply for an extension of time to pursue the assessment of damages was of no significance. (emphasis added)

[51] After considering *Koay Hean Khoon, A2i Co Ltd* and *Berjasa Information System,* this court is of the opinion that despite the mandatory nature of O. 37 r. 1(1) ROC 2012 this court would also have to take into account the right that the plaintiffs had acquired under O. 37 r. 1(1) RHC 1980 where there was no period prescribed for the plaintiff to commence the assessment of damages. This substantive right was gained when the Court of Appeal initially ordered damages to be assessed by the Registrar on 1 December 2009.

[52] As O. 37 r. 1(1) RHC did not provide a prescribe period for the plaintiff to commence the assessment of damages, s. 54(2) of Interpretation Acts 1948 and 1967 (the Interpretation Acts) would be applicable in this instance. The Interpretation Acts make provisions for the interpretation of written laws. In the case of the RHC 1980 it is a subsidiary legislation made under the Courts of Judicature Act 1964. By virtue of s. 2(1)(e) of the Interpretation Acts, s. 54(2) under Part I of the Interpretation Acts apply in the interpretation of the RHC 1980. See *Takang Timber Sdn Bhd v. Syarikat Tingan Lumber Sdn Bhd* [2001] 7 CLJ 641, s. 54(2) specifically states:

Computation of time

54 (1) In computing time for the purposes of any written law

(a) …

(b) …

(c) …

(d) …

A (2) Where no time is prescribed within which anything shall be done, that thing shall be done **with all convenient speed** and as often as the prescribed occasion arises. (emphasis added)

[53] In the circumstances of this case s. 54(2) of the Interpretation Acts must be read together with O. 1A, O. 2 and O. 3 ROC 2012. This court B would have to determine whether this application for extension of time had been done "with all convenient speed". In coming to any determination of this matter, this court would have to consider whether there was an inordinate delay. In doing so, this court would also take into account the reasons for the delay and whether any prejudice had been caused to the first C defendant. If there was, whether the prejudice caused can be compensated with cost.

[54] It is undisputed that there was an eight year gap from the judgment of the Court of Appeal to the filing of this application. The gap from the judgment of the Federal Court to the filing of this application is slightly over D three years. The main reason given by the learned counsel for the plaintiff for this delay was that the plaintiff wanted to wait for the determination of the number of sub-purchasers to be added under the representative action. The other reasons for the delay was the two motions filed in the Federal Court and the application to intervene by 119 interveners in encl. 1.

E **[55]** I accept learned counsel for the defendants' submission that the number of sub-purchasers was never an issue in this at any stage of the proceedings right up to the Federal Court. At all material times, the number of plaintiffs and sub-purchasers reminded at 217. This is evident from the fact that there was no attempt to amend the number of sub-purchasers even when F the "Pindaan Pernyataan Tuntutan Pinda Semula Kedua" was filed. It was expressly pleaded in the amended statement of claim that the term "plaintif-plaintif" only included the plaintiffs' name and the sub-purchasers they represented.

[56] At the High Court stage, the number of sub-purchasers had already G been ascertained at 213. The parties only disputed whether all the alleged sub-purchasers must be identified and whether consent of all the alleged sub-purchasers must be obtained before filing this representative action. The learned High Court Judge held that the alleged sub-purchasers need not be identified and their consent was not necessary. The learned High Court Judge H also mentioned in his grounds of judgment that "The four named plaintiffs, three of whom did not give evidence, purport to represent 213 other persons who are also described as sub-purchasers to plots in the said land." *Vellasamy Ponnusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors* [2006] 1 CLJ 805; [2006] 2 MLJ 715 High Court.

I

[57] The finding of the High Court was affirmed by the Court of Appeal. Her Ladyship Zainun Ali (as she then was) in her minority judgment, affirmed the finding of the High Court on this issue and ruled that in a representative action, identities and consent of the parties represented are not required. It must be stressed that although Her Ladyship's judgment was a dissenting judgment, the passage mentioned below was never disputed or raised as an issue by the other panel judges or the Federal Court. The relevant part of her judgment states as follows:

> [223] It is trite that the three criteria to satisfy the rule are common interest, common grievance and that the relief sought must be beneficial to all (*Tong Tai Holdings Sdn Bhd v. Jimi ak Mantali & Ors* [2003] 5 MLJ 450).
>
> [224] Though the defendant took the approach that the 213 sub-purchasers represented by the four plaintiffs were at no time identified in the evidence either by name or the plot numbers they hold in the land, and that there were varying agreements (for sale of shares or for sale of land) thus there was no common interest, and the learned trial judge found this contention to be unsustainable.
>
> [225] The first defendant's further contention that the fact that 43 of the sub-purchasers had entered into agreements with the first defendant made it uncertain as to whether these 43 sub-purchasers came with the 213 plaintiffs.
>
> [227] The learned trial judge took the position that the exact identity of the persons whom the four named plaintiffs are representing are not critical nor imperative. The absence of these is not an impediment to commencing a representative action so long as they are a class of persons with a common interest and a common grievance.
>
> [228] The learned trial judge found that the said representative action of the plaintiffs was properly constituted even if in the event of success, they would be entitled to different measures of relief. *In fact the 213 unnamed plaintiffs represented by the four named plaintiffs need not even give their consent,* and are not liable to costs (see *Sultan Azlan Shah (the FJ) in Eh Riyid v. Eh Tek* [1976] 1 MLJ 262).
>
> [229] I agree with the above finding of the learned trial judge and again, found no reason to intervene. (emphasis added)

[58] It is noteworthy that the plaintiffs never filed any notice of motion to the Court of Appeal in respect of the number of sub-purchasers despite the Court of Appeal having ordered "that parties be at liberty to apply for further orders or directions."

[59] That the number of sub-purchasers had been settled at 213 is evident from the fact that the Federal Court had dismissed first motion filed by the plaintiffs for the judgment of the Federal Court be varied to include more sub-purchasers. I therefore find the reason for the delay, namely "menangguhkan" for the plaintiffs to determine the actual number of purchasers lacks cogency.

[60] I also find that the filing of encl. 1 by Messrs M Manoharan cannot be a reason for the delay in filing encl. 20. As stated earlier, the issue of the number of sub-purchasers had already been settled. There was nothing to prevent the plaintiffs from filing the application for extension soon after the Federal Court order considering that the Federal Court, as the apex court, had already decided on the issue. In the circumstances, the delay of more than three years cannot be justified.

[61] This court is of the view that the delay in applying for assessment of damages had caused prejudice specifically to the first defendant. This becomes more apparent where the assessment concerns a large area of land involving many individual purchasers as in this case. The Federal Court had expressly ordered that the value of the plaintiffs' shares and individual plots be taken into account in the assessment of damages. Land is always deemed in law to have a special value as it is limited and therefore any damages have to be assessed on the basis that its price will rise: see *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15; [1995] 1 AMR 41; [1994] 3 MLJ 777, FC. In this respect, the long delay was detrimental to the first defendant.

[62] The first defendant will also be prejudiced in the sense that where judgment is entered and the quantum is to be assessed, interest on the judgment debt is to run from the date judgment was entered and not from the date the quantum was assessed. The long delay of more than three years would again be detrimental to him bearing in mind the many sub-purchasers involved. Perhaps this may also be the reason why O. 37 r. 1(1) of the Rules of Court 2012, now requires the party entitled to the benefit of a judgment to apply within one month of the judgment to the Registrar for directions for assessment of damages. This would avoid any unnecessary accumulation of interest to the judgment debtor's detriment due to avoidable or unjustifiable delays in assessing damages. See *Vathemurthy Arumugam & Anor v. Rs Thanenthiran Raman Kutty & Anor* [2019] 2 CLJ 132.

[63] On the facts of this case, I find the delay of approximately eight years from the order of the Court of Appeal and three years from the order of the Federal Court is inordinate and prejudicial to the respondent. I also find that the reasons for the delay in applying for enlargement as time as unjustifiable. This delay would tend to also cancel out the deductions allowed by the Federal Court for the expenditure incurred by the first defendant from the assessed damages and profits.

[64] As to the contention by counsel for the defendants that the second plaintiff does not have the requisite authority to represent the deceased first and forth plaintiffs, I find that this does not affect the legality of this application. The fact remains that the third defendant together with the second defendant are still parties to this proceeding and the representative action still subsists.

Conclusion

[65] I find that there had been an inordinate delay in the filing of encl. 20. This delay had caused prejudice to the first defendant which cannot be compensated with cost. I therefore dismiss the application in encl. 20 and award cost of RM5,000 to the defendants.